IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 17, 2008

JONATHAN CLAUDE CORN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 87063 Kenneth F. Irvine, Jr., Judge

No. E2008-00928-CCA-R3-PC - Filed June 11, 2009

The petitioner, Jonathan Claude Corn, appeals the Knox County Criminal Court's dismissal of his petition for post-conviction relief from his conviction for first degree premeditated murder of his seven-week-old son and resulting life sentence. On appeal, he contends the trial court erred by not finding that petitioner's counsel was ineffective and that the ineffectiveness resulted in an unknowing and involuntary guilty plea. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the appellant, Jonathan Claude Corn.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Patricia A. Cristil, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The facts recited at the plea hearing reveal that the petitioner was the caretaker of his son, Zebadiah, from 9 p.m. on November 11, 2005, until 3 a.m. on November 12, 2005, when the petitioner called 9-1-1 because his son was not breathing. At the hospital, the following injuries were noted on the child: bilateral subdural hematomas, retinal hemorrhages, and bruises on his right arm, right leg, chest, right ear, and penis. Due to brain injuries, the child was placed on life support, where he remained for four weeks until life support was removed. The child died December 10, 2005. An autopsy report listed the cause of death as blunt head trauma caused from child abuse. The autopsy report also listed the trauma as a blow inflicted by the petitioner, which he admitted.

The petitioner filed a pro se petition for post-conviction relief, in which he alleged that his plea was involuntary, that his conviction was based on a coerced confession, and that trial counsel was ineffective because he (1) did not explain intoxication as a potential defense, (2) did not explain

that the petitioner could request a jury instruction on accidental death, (3) did not explain culpable mental states to the petitioner, (4) did not explain that a jury would sentence the petitioner if convicted of first degree murder, (5) did not explain the lesser included offenses of reckless homicide and criminally negligent homicide, and (6) did not explain intentional killings. He claimed that he entered his plea due to counsel's ineffectiveness. The trial court appointed counsel.

In his amended petition, the petitioner alleged that his trial counsel failed to interview witnesses; failed to advise the petitioner of the status of his case and theories of defense, particularly intoxication and accidental death; failed to file pretrial motions, including one to change venue; failed to obtain an independent medical expert to review the victim's autopsy and medical reports; failed to challenge the State's evidence; failed to inform the petitioner that his prior convictions for child abuse could be excluded; and failed to show or inform the petitioner of the evidence against him. The petitioner asserted that he pled guilty because he thought trial counsel was unprepared for trial and did not want to try his case. He also claimed that he accepted the plea offer because his trial counsel and co-counsel told him that the State could use his prior convictions for child abuse against him.

At the post-conviction hearing, the petitioner testified that he was twenty-nine years old at the time of the hearing and that he had a ninth- or tenth-grade education. He stated he understood that if the conviction were set aside, the State could re-indict him on the same charges and that he could receive the death penalty if convicted. He said that the allegations in the petition were true, although another inmate drafted the petition, and that he had reviewed the petition with this inmate and had signed the petition.

The petitioner testified that approximately six months elapsed between the appointment of counsel, two attorneys from the public defender's office, and the entry of his guilty plea. He said that during this six-month period, he spoke primarily with the assistant public defender ("trial counsel") once a week, for a total of twenty-four or twenty-five times. He said he also spoke with the public defender ("co-counsel") twice. He said that he was incarcerated during all of these meetings.

The petitioner testified that although trial counsel gave him a copy of the indictment and told him the charges against him, counsel did not go over each of the charges one-by-one with him. He said he understood that he was charged with the first degree premeditated murder and the first degree felony murder of his seven-week-old son, although he said he did not understand some of what counsel was telling him. He said he understood the charge of first degree murder. He claimed trial counsel did not tell him the elements of felony murder and professed to understand the charge only "barely" at the time of the hearing, even after twenty-five meetings with counsel. He then claimed counsel did not go over the other charges with him or tell him of any lesser included offenses of first degree murder other than second degree murder. He said counsel told him on separate occasions that he would face a life sentence or a death-penalty sentence. He said counsel did tell him that he could have a jury trial, which he said he wanted. He said he knew the jurors could impose a death sentence.

The petitioner testified that trial counsel did not tell him that he had interviewed anyone who might have had information regarding the case and that he did not know if his attorney had, in fact, interviewed anyone. He said that counsel told him he had filed a discovery motion but that counsel had not shown him any other motions. He said trial counsel did not file motions to suppress his confession, to change venue, or to exclude his prior convictions, which he said were from North Carolina for child abuse, felony child abuse, and a "sex crime." He said trial counsel never told him he could file a motion to exclude these, although he acknowledged that he and trial counsel discussed his prior convictions.

The petitioner testified that he never told trial counsel the facts of the case because he was scared. He said he did not remember the date of the offense. He said he never told trial counsel that he had never hit his child before the offense, and he said he did not think he had hit the child on the date of the offense. He said he called an ambulance on the date of the offense. He said his child was placed on life support, where he remained for approximately one month. He said that he visited the child in the hospital and that the decision to remove life support was made by the child's mother, who was the petitioner's girlfriend. He said he had no role in this decision.

The petitioner stated that trial counsel never told him that he had interviewed the child's hospital physicians and that he did not know if they had been interviewed. He said trial counsel showed him the child's medical records, although he claimed trial counsel only mentioned that the child had bruises and not broken bones. He said he told trial counsel that the medical report's claim that the child had bruises was not true. He said the report concluded the cause of the child's death was trauma to the head. He also said that he told trial counsel to interview the child's mother and that he did not know if trial counsel had spoken with her.

He said he and trial counsel never discussed possible theories of defense, such as accident, intoxication, or insanity. He said trial counsel did not want him to testify at the trial. He said he and trial counsel discussed entering a guilty plea two or three times. He said trial counsel did not advise him to enter the plea but instead left it to the petitioner to decide. He said that trial counsel told him the State was going to seek the death penalty if the case went to trial but that he did not tell him the State had already filed written notice of an intent to seek the death penalty. The petitioner stated that he thought the State was seeking the death penalty when he entered his guilty plea and that he based this on his conversations with trial counsel. The petitioner also stated that he pled guilty because his father, who was present at a meeting where the petitioner spoke with both trial counsel and co-counsel, talked him into it. He also stated that he pled guilty because he did not think trial counsel was prepared to try the case, claiming that trial counsel did not investigate the case and merely advised him to plead guilty. He said that if trial counsel had been prepared, he would have insisted on going to trial. He claimed he was innocent of the charges.

On cross-examination, the petitioner agreed that he pled guilty to first degree premeditated murder and not to felony murder. He denied two people, Roman Paul and Wendy Ogle, had been at his house the day of the events leading to his conviction, and he said he only told trial counsel to speak with the child's mother. He later said that he told trial counsel to speak with the people on the State's witness list. He said that when trial counsel visited him in jail twenty-five times for thirty or forty minutes each time, trial counsel did not ask him about people to contact or the facts of the

case. He stated he could not remember what they talked about during those visits. He said that neither he nor the child's mother had custody of the child during the child's hospital stay. He stated that when he entered his plea, he knew that he was facing two more severe penalties than the one he would receive through the plea agreement. He acknowledged that trial counsel had told him the death penalty was a possible trial outcome. He also restated that trial counsel had not advised him to plead guilty but had instead left it to him to decide. He agreed that he entered his plea after discussing it with trial counsel, co-counsel, and his father. He said that neither trial counsel nor co-counsel told him what to decide. He stated that his father did not tell him what to do but instead offered his opinion when he and the petitioner discussed the plea. He agreed that he pled guilty after hearing his father's opinion.

John Ivan Corn, the petitioner's father, testified that although he lived in North Carolina, he had four or five conversations with the petitioner's attorneys at their offices. He said that from these conversations, he understood the charges against the petitioner, although he claimed neither attorney told him the facts of the case against the petitioner. He stated that he was only told something about shaken baby syndrome. He said he was never shown any evidence against the petitioner. He said he and co-counsel became "close" during the proceedings. He said that co-counsel telephoned him and told him that the State was going to seek the death penalty against the petitioner; that with the petitioner's prior convictions, the State would obtain a death sentence; that the petitioner did not want to accept a plea offer; and that he asked him to come to Tennessee to speak with his son about accepting the plea offer. He said that he came to Tennessee and that he, trial counsel, and co-counsel spoke to the petitioner in the jail. He said that he believed the State was seeking the death penalty against the petitioner. He stated that he and his son discussed the plea offer and that he told the petitioner to accept the plea offer because "his mother couldn't stand to see him die." He said that he influenced the petitioner's decision to accept the plea offer and that he was present when the petitioner entered his guilty plea three or four days after meeting with his father and his two attorneys.

On cross-examination, John Ivan Corn testified that he came to see trial counsel and co-counsel personally and that he gave them the names of the people who had watched the baby a few days before the 9-1-1 call. He said he also spoke with the petitioner's neighbors and wanted to know why the child's mother was not charged. He did not, however, know the date of the child's death. He said that he did not know what had happened, if anything, after he gave trial counsel and co-counsel the names of the caretakers. He said he only recently found out that they had not spoken with these people. He also stated that he knew someone with whom trial counsel and co-counsel should have spoken and that this person told him he had not been contacted. He said he told his son to accept the plea offer. He said trial counsel and co-counsel told him that although the State had not sought the death penalty in three years, they were going to seek it in the petitioner's case and that they would obtain it.

The petitioner called trial counsel, who testified that he was an assistant public defender licensed to practice in Tennessee since 1994 and licensed in two other states prior to obtaining his Tennessee license. He said that approximately six months elapsed from the date he was appointed to the case until the date of the plea hearing. He said that because the charging document was a presentment, there was no case information with which to work. He said he saw the petitioner for

the first time the day before the petitioner's arraignment. He stated that he met with the petitioner nineteen times and that some of these visits lasted more than the forty minutes stated by the petitioner. He said he thought he showed the petitioner a copy of the presentment, although he could not specifically recall doing so. He said he believed the petitioner understood the charges against him and the possible punishments.

Trial counsel testified that the petitioner's testimony that he did not talk with trial counsel about the facts of the case was not true. He said they spoke about what happened the night of the 9-1-1 call. He said the petitioner told him that his girlfriend, Tracy, went to work and that the petitioner was at home taking care of their child. He said the petitioner and he talked about alcohol and whether the petitioner was intoxicated at the time the child was injured. He said the petitioner's blood alcohol content, measured at the hospital two hours after the 9-1-1 call, was 0.05 or 0.06. He said that the petitioner told him he had consumed a six-pack of beer and that on more than one occasion the petitioner had told him that he required twenty-four beers to become "hammered."

Trial counsel testified that the petitioner had told him he had pinched the child because he had heard an adage that if you pinched a baby, it would cry. He said the petitioner attributed two of the older bruises to being pinched. He stated that he and co-counsel were not able to interview Tracy Wheately because she moved to Ohio and her phone number was no longer valid. He said that he was unable to find new, valid contact information for her. He said he and co-counsel wanted to contact "Amanda," the mother of the child involved in the petitioner's North Carolina cases, but he thought they were unable to find her.

Trial counsel stated that he and co-counsel had copies of all the State's evidence against the petitioner: statements from Paul Rome, Wendy Ogle, and Tracy Wheately, information from the Department of Children's Services, information about the petitioner's cases in North Carolina, and the State's investigative file for this proceeding. He said he and co-counsel were in the process of figuring out how to proceed with this information. He acknowledged that he had been unable to corroborate any of the statements against the petitioner. He stated, however, that he discussed all the discovery with the petitioner, including the crime scene photographs and the autopsy report. He said he did not show the petitioner the autopsy photographs because they would have distressed the petitioner. He acknowledged that they perhaps did not go over the autopsy report in great detail. He said they had not yet hired a medical expert to review the victim's medical records and autopsy report, which he said would have been the same items.

Trial counsel testified that the State sought the death penalty. He said he and co-counsel went to the district attorney's office twice to try to convince the State not to seek the death penalty. He said the State then offered a plea bargain and gave them a date by which to accept it. He said that the State would have filed a notice of intent to seek the death penalty if the petitioner had not accepted the plea offer. He said he and co-counsel were able to obtain at least one extension of this date in order to keep discussing the case and to allow the petitioner's father to come to Knoxville to speak with his son. He said that he had no doubt that the State would seek the death penalty at trial and that he explained all this information to the petitioner. He said the petitioner understood that if he did not accept the plea, he would face the death penalty at trial. Counsel stated that sufficient evidence existed to convict the petitioner, but he also stated that mitigating factors existed

against imposing the death penalty. He said that he thought the case could go "either way" and that he told the petitioner about the evidence, factors, and his assessment.

Regarding discussion of a plea, trial counsel testified that the petitioner spoke with him about accepting a plea of thirty or forty years at thirty percent and not accepting a plea of forty years at eighty-five percent. Trial counsel stated that they had more than one discussion regarding pleas, which the petitioner initiated, where the petitioner expressed his interest in accepting a plea, but not one for life. Trial counsel stated, however, that as the date approached for accepting the State's plea offer of a life sentence with the possibility of parole, the petitioner realized he would need to accept the State's offer.

Trial counsel testified that from his discussions with the petitioner, he saw no reason to think the petitioner had a "mental illness that would rise to the level" of insanity. He said the petitioner thought that perhaps Paul Rome or Wendy Ogle had inflicted the child's injuries. He said that Tracy Wheatley said this in her statement, as well. Trial counsel stated, however, that because all the people involved in this case, including the petitioner, agreed that the child was in good condition when he was left in the petitioner's care, there did not appear to be anything to pursue further to inculpate Tracy. He said that because witnesses had observed the petitioner handle the child while intoxicated and were of the opinion that he was handling the child too roughly, "we did not think there was anything based on that" for a possible defense. Trial counsel stated that he surmised the petitioner had been drinking, became angry due to the baby's cries, and then "acted in the way of a ten-year-old child."

Trial counsel testified that he was not aware that anyone claimed to have seen the petitioner hit the child before November 11, 2005. He said he and co-counsel obtained the police videotape from the first of the petitioner's two domestic violence incidents against Tracy Wheatley. He did not remember whether they obtained the videotape from the second incident. He said there was nothing in the petitioner's statements to the police that merited suppression. He agreed with the petitioner's testimony that he did not advise the petitioner that he should accept the plea offer but that he "stayed kind of neutral about that." He said that the decision to plead was the petitioner's. He stated that the petitioner's father may have been correct in stating that co-counsel was more convinced the petitioner would receive the death penalty at trial. He said he was not present for all of the conversations between co-counsel and the petitioner's father.

On cross-examination, trial counsel testified that he spoke with the petitioner about intoxication as a possible defense. He said he went over the charges with the petitioner and explained child abuse as the basis for felony murder. He said he told the petitioner that child abuse required inflicting a "knowing" injury to the child, that is, one by other than accidental means. He said he and co-counsel told him that the State had the burden to disprove an accidental death to satisfy the elements of the offense. While trial counsel said he did not remember going over culpable mental states with the petitioner, he did recall discussing the elements of second degree murder. He said he thought he and the petitioner discussed the indictment and some of the lesser included offenses at the beginning of the representation. He was sure that he and co-counsel told the petitioner that if the State filed its notice to seek the death penalty, the case would involve jury sentencing. He stated that the death penalty was their primary concern and that they wanted to make

sure the petitioner was fully informed about it. He said that because his notes reflected the petitioner discussed being convicted of first degree murder or a two-year offense, they must have spoken about lesser offenses. Regarding the petitioner's guilty plea, trial counsel stated that he and co-counsel explained the potential sentences for a first degree murder conviction: death penalty, life without parole, and life with the possibility of parole. He stated that he was present during some of the conversations between the petitioner and his father and between the petitioner and co-counsel. He said he and co-counsel explained the State's offer to the petitioner and the consequences of not accepting the offer, that is, they would go to trial and the State would file its notice of intent to seek the death penalty.

On redirect examination, trial counsel testified that he and the petitioner spoke about the North Carolina convictions. He said he told the petitioner that the child abuse convictions would not come into evidence during the guilt phase unless the petitioner opened the door to inquiring about them by, for example, stating that he would never hurt a child. He said he told the petitioner that the convictions would come in during the penalty phase as statutory aggravating circumstances the State would try to prove.

The trial court dismissed the petition after finding that the petitioner did not establish by clear and convincing evidence that (1) his guilty plea was entered unknowingly, involuntarily, or unintelligently and (2) trial counsel and co-counsel were deficient and their deficiency prejudiced the petitioner. The trial court stated that the petitioner pled guilty to the first degree murder of his son to avoid facing the death penalty at trial after speaking with trial counsel, co-counsel, and his father, who told him to plead to spare the family further pain. The trial court found that the petitioner took the wishes of his family into account when deciding to accept the plea offer. The trial court stated that it accredited the testimony of trial counsel, who testified that he discussed the charges against the petitioner, over the testimony of the petitioner, who claimed there was no discussion of the charges or facts of the events leading to the charges. The court found that trial counsel and co-counsel were investigating the petitioner's case and knew the case had to be pleaded to avoid a possible death sentence and that they conveyed the information they had to the petitioner. The court found no merit to the petitioner's claims that trial counsel and co-counsel failed to discuss the case with him or to investigate the case adequately.

On appeal, the petitioner contends that the trial court erroneously dismissed the petition for post-conviction relief because the petitioner's claim was not knowingly, voluntarily, and intelligently entered due to the ineffectiveness of trial counsel and co-counsel. He claims that his plea was involuntary and unknowing because trial counsel and co-counsel failed to investigate the case and knew the petitioner did not want to plead guilty. He claims that the petitioner accepted the plea based on conflicting advice from trial counsel and co-counsel. He states that co-counsel was convinced the petitioner would receive the death penalty, while trial counsel thought the evidence would support either a death penalty or non-death penalty result. The State claims the trial court properly dismissed the petition. The State also argues that the petitioner raised his claim that trial counsel and co-counsel gave conflicting advice for the first time on appeal and that the proof presented at the hearing did not support this claim.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. When a petitioner pleads guilty, he must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Adkins v. State, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994).

In view of the testimony at the post-conviction hearing, the petitioner has not shown that trial counsel or co-counsel was ineffective. We note that the trial court accredited the testimony of trial counsel over that of the petitioner. Trial counsel testified that he and the petitioner met over a six-month period nineteen times, with some of the meetings lasting longer than forty minutes, and that they discussed the presentment; elements of the charges, including the lesser included offenses; the potential sentences, including the death penalty and its imposition by a jury; the evidence against the petitioner; the effects of the petitioner's prior convictions on the first degree murder proceedings; and the petitioner's own account of the events of the night of the 9-1-1 call and his interest in a plea offer. The petitioner testified that he did not remember what he and trial counsel discussed during their numerous and lengthy meetings. Trial counsel testified that he and co-counsel tried unsuccessfully to locate both "Tracy" and "Amanda," contrary to the petitioner's claim that no investigation occurred. The petitioner also has not presented evidence that an expert witness was necessary to review the victim's autopsy report and that the autopsy report contained information relevant to a defense. Trial counsel additionally testified the petitioner said that he had consumed a six-pack of beer that day and that more alcohol was necessary for him to be inebriated, thereby excluding intoxication as a defense. The petitioner also has failed to demonstrate that pretrial publicity violated his right to a fair trial, particularly in view of his entry of a guilty plea. The petitioner has not presented any evidence showing deficient performance of counsel and that but for the errors of counsel, he would have gone to trial or would have received a better result.

The petitioner also has not presented evidence that his plea was unknowing and involuntary. The evidence presented at the hearing showed that the petitioner entered his guilty plea to obtain a life sentence with the possibility of parole after he discussed with trial counsel on several occasions going to trial when the death penalty was a possible sentence. He also entered his plea after hearing his father's advice to accept the plea. Trial counsel additionally testified that he discussed the

petitioner's prior convictions with him and that he explained to the petitioner if, when, and how the convictions would be used against him. None of the evidence shows any hint of coercion or ignorance of the consequences of the plea. The petitioner has failed to show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. The trial court properly dismissed the petition.

We note as well that the petitioner did not present his involuntary guilty plea allegation of conflicting advice from trial counsel and co-counsel in his pro se or his amended petition. By failing to present the issue to the trial court, the issue is waived. T.C.A. § 40-30-110(c), (f).

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, PRESIDING JUDGE